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Reading cases in interdisciplinary studies of law and literature

Alan Durant

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The concept of a ‘case’ differs between law and other fields in which the term is used, including literature. So establishing what a case *is*, in interdisciplinary studies of law and literature, is an important step in identifying what is distinctive about such work. It is also important to establish what is involved in ‘interpreting’ a case, since each of the fields contributing to this interdisciplinary endeavour follows its own, distinctive approaches. Historically, the study of law and literature has been shaped by a series of approaches to interpretation which have served to define the field’s purposes and significance.

An influential example of interaction between interpretive approach and the value associated with studying law and literature provides my starting point for this chapter. As far back as his Preface to the second edition of *Law and Literature* (in the late 1990s), Richard Posner observed that ‘literary’ approaches to interpretation of legal discourse had ‘diminished in the face of a growing sense that interpretation is relative to purpose and therefore unlikely to raise the same issues for different interpretanda (dreams, operas, labels, constitutions, sonnets)’.¹ Later in the same volume, Posner observed that the decline of interest in ‘literary’ approaches to interpretation he was reporting also reflected considerations of method. Specifically, he argued, interpretation is ‘not much, and maybe not at all, improved by being made self-conscious, just as one doesn’t become a better reader by studying linguistics’.² In this chapter, I ask how far Posner’s scepticism about the value of ‘literary’ styles of interpretation applied to legal discourse (as well as his reservation about the usefulness of linguistic self-consciousness in reading) holds for cases in common law traditions, which differ in important respects from the statutes and constitutions on which Posner based his original argument.

My discussion³ has two stages. To begin, I look at the general concept of a ‘case’, questioning how far the notion is coherent if extended beyond legal cases to literary topics and to literary works with legal themes. I suggest that invoking an undifferentiated sense of ‘case’ in interdisciplinary enquiry opens up interpretive possibilities but risks vagueness and ambiguity. In the second half of the chapter, I focus on ‘case reports’ in law: the genre of publication usually known as ‘law reports’. Such reports offer the most precisely defined legal representation of cases; they also often attract expansive comment as well as legal exegesis, including along lines influenced by literary studies. I explore

¹ Richard A. Posner, *Law and Literature*, 2nd edition, Cambridge Mass: Harvard University Press, 1998, p.viii.

² Posner, *Law and Literature*, p.211.

³ I am grateful for comments on an earlier draft of this chapter from several colleagues at Middlesex University Business School, London: Maureen Spencer, Ifan Shepherd, and John Weldon.

how far genre considerations associated with law reports constrain the interpretive approaches that can be usefully brought to bear on them, as Posner argued was the case for statutes and constitutions. In partial agreement with Posner, I conclude that close links between the formal characteristics and purposes of law reports do place obstacles in the way of alternative readings. But I suggest that those obstacles need not undermine an extended sense of interpretation which can result in illuminating critical readings. My agreement with Posner's argument is only partial, however. Against his further claim that reflexivity in interpretation is generally unhelpful, I argue that even highly insightful literary readings of particular legal cases are less important than increased self-consciousness as regards *how* meanings are created by interpretive practices that differ in important ways, as well as overlap, between the two fields.

Different kinds of 'case'

There is little risk of someone who is following an academic course in law and literature becoming confused by what is meant by a 'case' in different edited collections they are directed to read. If you open a literary-critical 'casebook' (such as R.P.Draper's, *Thomas Hardy: the Tragic Novels (Casebook)*, or Peter Widdowson's 'new casebook' *Tess of the D'Urbervilles*⁴), you will find a selection of essays introducing the reader to critical approaches to the text or texts in question. The general purpose of such volumes is clear. In the General Editor's Preface to the Casebook series, launched in 1968, A.E.Dyson explained that each 'single author' casebook would present critical readings of a well-known work, or cluster of closely related works, along with contemporaneous reviews and comment. In the General Editors' Preface to the 'New Casebook' series, John Peck and Martin Coyle widened that aim to reflect a shift in literary studies: the new volumes, they wrote, would also reveal how contemporary criticism has 'changed our understanding of commonly studied texts and writers, as well as of the nature of criticism itself'.⁵

In striking contrast, in a legal textbook of cases and materials (such as William Cornish's, *Cases and Materials in Intellectual Property* or Eric Barendt and Linda Hitchens's, *Media Law: Cases and Materials*⁶), the reader is presented not only with a very different selection but with sources that serve a contrasting purpose. Such case collections in law are designed to bring together 'legislative texts and extracts from cases which form the basis of United Kingdom law'⁷. In Barendt and Hitchens, the focus is on 'the range of topics comprising media law'⁸; in Cornish, on the 'various aspects of intellectual property rights proper and those topics, such as liability for breach of confidence and passing off, which form adjuncts'.⁹ Such texts provide either a combination of 'key materials with

⁴ R.P.Draper (ed), *Thomas Hardy: the Tragic Novels (Casebook)*, Basingstoke: Palgrave, 1991; Peter Widdowson (ed), *Tess of the D'Urbervilles (New Casebook)*, Basingstoke: Palgrave, 1993.

⁵ Widdowson (ed), *Tess of the D'Urbervilles*, p.ii

⁶ William Cornish, *Cases and Materials on Intellectual Property*, 5th edition, London: Sweet and Maxwell, 2006; Eric Barendt and Linda Hitchens, *Media Law: Cases and Materials*, London: Pearson, 2000.

⁷ Cornish, *Cases and Materials on Intellectual Property*, p.vii.

⁸ Barendt and Hitchens, *Media Law: Cases and Materials*, p.xi.

⁹ Cornish, *Cases and Materials on Intellectual Property*, p.vii.

critical commentary', as in Barendt and Hitchens,¹⁰ or, as in the Cornish volume, are 'intended to be used together with texts that give an account of the law as a corpus [the book] does not therefore have its own commentary'.¹¹

Both kinds of volume - legal and literary - offer useful collections of 'case' material. But they deploy the idea of a 'case' differently. The contrast I have drawn between them is significant because the same word 'case' can be used of either type of publication. It is therefore worth examining what the word 'case' denotes, then relating the word's varying meanings to wider understandings of 'case' at work in law and literature scholarship.

Even confining ourselves to common dictionary definitions, we find a range of senses. We may immediately rule out, as not relevant, the idea of case as grammatical category, formally marked by inflection. We might also take the view that the meaning 'container, receptacle or box' (which gives rise to upper-case and lower-case keyboard characters) is simply figurative in marking edges or boundaries, and again irrelevant. But there are other meanings which complicate what a 'case' is for the purpose of interdisciplinary work in law and literature.

We may pause, for example, over 'a particular situation or instance, especially one that you are using as an example of something more general'. Based on evidence from the Cobuild dictionary project,¹² this is the most common contemporary sense of 'case'. When we talk about 'the case of literature', we mean matters pertaining to literature as an instance of some more general phenomenon, in contrast with other cases (such as 'the case of physics'). Those other cases are viewed as being different while also being members of the same larger class (in this case, that of objects of study).

This combined sense of particulars treated in terms of their membership of a superordinate class has ramifications both in law and in literature. A legal 'case', for example, is a highly detailed social and discursive event: it encapsulates an episode of what might loosely be called real-life drama; and its events are important lived experiences for the parties, sometimes deeply damaging or even tragic, which are selectively framed as a distinct entity for legal analysis and judgment.¹³ At the same time,

¹⁰ Barendt and Hitchens, *Media Law: Cases and Materials*, p.xi.

¹¹ Cornish, *Cases and Materials on Intellectual Property*, p.vii.

¹² 'Cobuild' is the name of a lexicographical project which results in a range of dictionary and language products, in this context notably the *Collins Unabridged English Dictionary*, based on a 2.5 billion-word database. For a historical account of interaction between various senses of 'case', see instead the *Oxford English Dictionary* (in which meanings and examples are grouped on historical principles).

¹³ The personal and social impact of cases is explored by, among others, A.W. Brian Simpson in *Leading Cases in the Common Law*, Oxford: Clarendon Press, 1995. Explaining his choice to excavate the background of cases in the manner of an archaeologist, rather than confining attention to points of legal significance, Simpson describes (p.10) how most 'case studies' analyse cases 'without anyone knowing or indeed caring who the litigants were, why they litigated, what they were trying to achieve, what they did achieve', and so on. Analyses of other cases read contextually, in some instances with a critical impetus, include Maureen Spencer and John Spencer, 'Coping with *Conway v Rimmer* [1968] AC910: how civil servants control access to justice', *Journal of Law and Society*, vol. 37, no. 3 (2010), 387-411. A recent collection in a similar spirit to Simpson, looking at a range of well-known cases across different areas of law, is Ian McDougall (ed), *Cases that Changed our Lives*, London: Butterworths Law, 2010.

each legal case is an instance of a more abstract, general category: a copyright case, negligence case, murder case, fraud case, etc. In relation to this superordinate classification, the facts of the particular case are exactly *subordinate*: the case is remembered in legal circles, if at all, as dealing with a legal crux of some kind, and the question at law has the effect of displacing the persons and their actions, despite the case being permanently labelled with their names as the parties.¹⁴ When juxtaposed with the first idea of ‘case’, this second, abstract notion suggests a different act of framing: a ‘case’ is less a specific situation that needs to be settled than a springboard offered by a set of particulars into generalisations which set out a legal principle.¹⁵

The ‘instance and category’ meaning is also applied beyond law. A *literary* ‘case’ depends similarly on a combination of particulars and overarching, discipline-specific categories. The particulars include details of production, such as a writer’s source materials, chosen themes, and habits of composition. There are also the different kinds of agency involved in the preparation, publication and circulation of a literary work, including the work of editors who amend passages and guide publication, reviewers and critics who advance alternative views, and literature teachers and students who argue over techniques and significance. In addition there are institutional settings: publishing houses, college seminar rooms, and reading groups. There are also equivalent abstract, disciplinary categories that a literary ‘case’ may exemplify. These include works by the particular author, work in a given genre, and work treating some recognised critical or historical theme or problem. Something similar also occurs beyond literature. Cases are treated as both specific instances and exemplars of a general category in professional fields variously concerned with disease, injury and hardship. The word ‘case’ is used of people attended by a doctor, for example, or who are in treatment with a psychoanalyst, or who become clients of a solicitor or financial advisor. In each of these professional fields of cases, casework, caseloads and case workers, the combination of ‘particulars plus treatment on the basis of membership of a disciplinary category’ is the clearly active meaning of ‘case’. What can nevertheless complicate the *interdisciplinary* study of ‘cases’ is that the general formula may be applied in ways that impose too strong a likeness on analogous instances of particulars and categories. Insufficient attention to differences in this regard blurs the distinction between principles of selection of an

¹⁴ One oddity of cases being known by the names of the parties is that, in Victorian law reporting (if less markedly since), reference to the parties by name *within* a report was minimal. Instead, parties were referred to as ‘plaintiff’ and ‘defendant’, commonly without articles, as effectively ciphers in a legally-constituted universe of discourse rather than people whose lives had been disrupted by involvement in a social dispute which had escalated into a legal action. See Ayelet Ben-Yishai, ‘Victorian Precedents: narrative form, law reports and *stare decisis*’, *Law, Culture and Humanities* 2008: 4: 382-402; see especially p.385 and p.394.

¹⁵ Hence the contrast Simpson draws in his advocacy of a more contextual approach: ‘Litigation entails a process of filtering -- sometimes pushing and shoving -- the messy and untidy business of life into artificial legal categories’ (*Leading Cases*, p.11). The distinction between two levels (social and legal) has been explored more theoretically in Ronald Dworkin, *Law’s Empire*, London: Fontana, 1986. Dworkin’s first chapter (‘What is Law?’) reviews established distinctions between facts, legal problems and legal reasoning; the book then develops (as much of Dworkin’s more recent work also does) by investigating difficult questions that surface at the legal level, including what makes some cases ‘hard cases’ that require additional principles of legal reasoning if they are to be settled by something more than judicial discretion.

instance, and mixes models of what will qualify any given instance as a member of the relevant category.

A further shading of meaning of 'case' highlights special complexity when the 'instance and category' model is applied to verbal discussion. In such circumstances, 'case' can mean not only a topic of discussion, as with 'the case *of* electoral reform' (contrast: 'the case of education reform'), but rather some argument or evidence supporting a particular position within such discussion (cf. 'the case *for* electoral reform'). This meaning has considerable scope. It extends to the view of a literary work as an object of competing literary critical appreciations (e.g. 'the case for seeing Tess as heroine rather than victim'). A literary case, then, may be not just a case study or test case, but a 'topic' case about which 'argument' cases are put forward from different critical positions.

What is significant about such polysemy (which if over-emphasised can begin to feel like a semantic game) is mostly not the prospect of local misunderstanding. Rather, it is that, when a notion such as 'case' is used in a new field or in interdisciplinary work between established fields, it is uncertain, without clarification, how a given 'case' should be investigated or exactly why a particular case deserves attention.

What sense or senses of 'case', we should therefore ask, are in play in interdisciplinary work on law and literature? Clearly the 'court proceedings' sense occurs frequently (used either of actual legal cases or applied to depictions of trials in fiction or drama, such as the scarcely narrated murder case in which the character Tess is the defendant). The 'argument' sense is also relevant (e.g. the defence case implicit in Tess's circumstances at the moment she kills Alex, the formulation or rebuttal of which oddly features hardly at all in the novel). The 'instance and category' sense will also be found (e.g. 'in the case of Tess but not of Hardy's other protagonists in his 'Novels of Character and Environment'); and there will be the broad 'framed narrative' sense (as in 'the case of Tess seems unique in nineteenth-century fiction'). This last meaning is challengingly wide, however. It evokes an only vaguely indicated category: possibly something related to actual events which took place during the controversy surrounding the novel's publication, or alternatively some unspecified, more general social phenomenon, or alternatively again some compound of fictional characteristics of the character Tess with an unspecified mix of social and historical conditions in nineteenth-century England and Hardy's known imaginative interests.¹⁶

We should take stock at this point. I am suggesting that contrasts between different kinds of 'case' collection reveal potentially important differences between legal and literary uses of the idea of a 'case'. Each contrast problematizes the issue of what should be studied in this field, and how any given 'case', as an object of study, should be treated.

¹⁶ Any number of different novels could be chosen to illustrate different senses of 'case' in literature. Franz Kafka's *The Trial* (*Der Process*, 1925) makes the issue of what constitutes a case peculiarly prominent, but has the complication for English readers of potentially different polysemy (in addition to Kafka's extensive use of metaphor) in the original German. Hardy's *Tess of the D'Urbervilles* was chosen here because the issues were practical ones for the present author in preparing an edition of the novel: Thomas Hardy, *Tess of the D'Urbervilles*, Penguin Student Edition edited by Alan Durant, Harmondsworth: Penguin, 2002.

1. There is a contrast of subject matter and treatment.

Even where a selected literary ‘case’ (a novel, play, author’s work) directly represents a legal situation or trial, the treatment of legal material is different. This difference points to a deeper contrast: that between something *being* a court case or part of a court case (a rule-governed discursive event), and something being a *representation* of a court case in a different discursive form (whether drama, novel, or law report).

2. In literary analysis there is typically one ‘case’: a selected novel, play, collection of poems, or author.

A literary ‘casebook’ anthology is a collection of commentaries on a work or author, published because its, his or her significance is considered worthy of commentary and further investigation. The selected excerpts are interpretations converging on that single case, which is set apart from the commentaries on it not least by the fact that the work is in a conventionally literary genre while the essays commenting on it take a literary critical form. The legal analogy is less that of a volume of case materials than an extended treatment of a single set of proceedings consisting of further documentary evidence and submissions.

3. While both law report and literary work deploy exposition and narrative in their representation of a case, there are differences as regards the claims being made.

The literary ‘case’ consists of narrated events that are mostly imagined or fictional (and which have their own complex origins in the author’s experience or subjective formation). Where material draws on an actual legal case, it does so by means of imaginative condensation, projection or exaggeration. In legal cases, on the other hand, a great deal of effort is made by judges to set out the facts to which they then apply the law. Reports of legal cases abbreviate the statement of such facts and the evidence that led to particular findings of fact. But this type of condensation serves to limit reports to legally relevant material; it does not alter the truth-claims made with respect to factual material.

4. Interpretation differs as regards how moves are made from evidence to significance.

The facts which guide interpretation of a *literary* case include patterns observed in a text’s language; external circumstances of authorship and creative intentions; and details of publication and reception. Interpretation of the text would almost certainly differ if techniques of legal construction rather than ordinary language comprehension were followed in reading its language. Doctrines of legal construction offer normative guidance in the interpretation of *legal* language (e.g. by interpreting ambiguity in favour of the defendant or against the meaning claimed by the party drafting a contract). Literary interpretation, by contrast, combines general intuitions regarding discourse meaning with awareness of specialised stylistic techniques adopted in literary works.¹⁷

¹⁷ The ‘facts’ underlying literary interpretation are no less contested than facts in legal cases, either in their detail or even as regards whether they exist at all. Vigorous criticism of the independent existence of

5. The underlying ‘problem’ being addressed differs between the two fields, with no shared standard of what constitutes satisfactory resolution of the problem that a case is thought to illustrate.

In law, concern is mainly with how the law stands in a particular area, and how the law in that area (as it stands) applies to particular findings of fact. Settlement of a dispute in a civil action, or the outcome of a criminal trial, is sought through legal reasoning applied to findings of fact, drawing on authorities that take the form of decisions made in relevant, earlier cases. There is therefore directionality in any sequence of cited cases which is more than chronological: a directionality that explains why the facts of any given case, once that action is concluded, are less important than the legal reasoning applied to them (since it is the reasoning which can establish a legal rule that is then carried forward).¹⁸ Literary cases also present a cumulative record of argument and insight. But ‘rules’ governing moves in a literary critical debate are less constrained as regards direction. Often, the more ‘well read’ or ‘cultivated’ a literary discussion, the more references will be triggered outwards, into an array of literary works and critical stances that the topic engages.

6. Cases differ between the two fields as regards how they are read.

Literature students typically read only one case per ‘casebook’, albeit against a background of extensive reading and with a view to analysing alternative cases (in the argument sense of ‘case’) submitted in relation to it. Their law counterparts read many cases in *their* collection. For the law student, the greater number of prescribed cases follows from the principle that each case illustrates legal submissions which informed the decision arrived at by the court. In this way, each case both presents a legal problem and sets out a legally reasoned solution to that problem in the form of judgment and verdict. Each case also refers to earlier cases which may themselves be read (in extract form) in the same edited volume. Together, the various cases form the series of steps carrying forward a developing legal argument which builds towards a statement of what the law now is.

7. While in each kind of case accumulated interpretations and judgments form traditions, the nature and significance of those traditions differ.

Literary-critical opinions form a tradition in the sense of a succession of arguments. They combine individual inventiveness and communal critical belief in a variable mix, and respond to changing artistic and social conditions. In literary critical history (as more visibly in the history of modern art), such traditions show uneven development, and

‘patterns’ in a text as facts can be found in, for example, Stanley Fish’s arguments against stylistics in, ‘What is stylistics and why are they saying such terrible things about it?’ [1973], in, Donald Freeman (ed.), *Essays in Modern Stylistics*, London: Methuen, 1981, pp.53-78.

¹⁸ Note, however, that the facts of a case continue to be relevant in assessment of whether an earlier case can properly serve as an analogue to a later case in which it is cited as a possible authority (see discussion below).

follow unpredictable patterns of influence, adaptation, subversion, critique and rejection of schools and positions. This is so both in creative work and in commentary on such work. It requires general artistic conservatism (e.g. some form of Classicism), or a more specific, idealist construct of the sort put forward by T.S.Eliot in his essay 'Tradition and the Individual Talent' (1919),¹⁹ to see literary tradition as development of cultural wisdom leading to a normative standard. The legal volume, by contrast, presents its series of cases not because they constitute a tradition in this loose sense of influence, but because, together, cases represent 'case law': an accumulating body of adjudications which fill in and clarify statute law, and as we see below may become precedents that bind later judgments within an overall common law system.

'Reporting' cases

The contrasts I have listed highlight (some would say unfairly accentuate) a number of differences within the broad class of 'cases' that are of interest in law and literature. In setting out the distinctions, I have nevertheless stayed away from a persistent, underlying issue: that of the *mode of representation* of such 'cases'. When we read a case, what exactly is it we are reading? Different ways that 'case material' is presented in published form are not mere stylistic alternatives; they stand in different relation to a fundamental problem in all representation, the problem of claims to truth (or to some other standard of meaningfulness).

What, for example, distinguishes 'reporting' a case from 'depicting', 'narrating', or 'representing' one? And how important is the difference between those alternatives? In (and surrounding) any trial, there is a cascade of different kinds of 'legal discourse': from formally sanctioned statutes, indictments, pleadings and oaths; through courtroom cross-examination, witness statements, and sometimes confession; into various kinds of news story, feature, dramatic and fictional account, and more definitive (but still varying) forms of published law report. Each of these 'case' genres may exhibit – indeed is likely to exhibit – a different epistemological commitment. It is therefore important to engage with questions of storytelling and authority in the representation of cases, and to consider what constitutes a 'report'. Within the general concept of reporting identified, it is then important to clarify how the most authoritative vehicle of legal narrative and exposition, the law report, guides case interpretation.

Consider the general notion of a 'report' first. The varying kinds of meaning potential outlined above in relation to 'case' are echoed, if not amplified, when we take into account the written forms in which cases circulate.

The word 'report', as either noun or verb, has a cluster of meanings. We may immediately filter out 'statement of progress at school' ('school report'); and we are also likely to exclude 'job reference'. More relevantly, though, there is the meaning of a 'statement widely made or known', or alternatively a statement 'communicated privately

¹⁹ T.S.Eliot, 'Tradition and the Individual Talent', *The Sacred Wood: Essays on Poetry and Criticism*, London: Faber, 1922.

to a particular addressee'. More significant again is the meaning of an 'account prepared for the benefit of others', especially an account that provides information obtained through investigation, such as the 'deliberations of a committee or other body'. 'Report' across these senses has as a core meaning not only that such accounts serve an information-giving purpose but that they aspire to being definitive: a report offers some kind of update, synthesis, or indication of outcome.

Scope for variation in the reporting of legal cases is nevertheless considerable, at least in principle. Representations of a case tell a story of that case: they record it, depict it, describe it or narrate it. In doing so, they frame an open-ended human or social experience that could be seen from some more than one point of view. The legal case is given its particular shape not only by imposition of a beginning and an ending, but by the structuring of the intervening narrative in such a way that special attention is given to sequence of events, causation, and responsibility or liability. Point of view is provided by a secondary level of framing, imposed by the shift that takes place from specific actions and events to generic classes of action and event, and from particulars to abstract legal categories and rules.²⁰ In these respects, law reporting, unlike other kinds of storytelling about law, make a stronger claim than that of merely collecting and telling good stories about real people (like a documentary), or of narrating the facts of a case and recording the decision made on those facts by the court. A further claim is implied: that the reported decision emerges from and illustrates due process. Law reports are in this respect a canonical instance of the factivity and closure that underpin notions of reporting. In a manner that parallels scientific reporting, they follow procedures aimed at controlling the truth-status of information they present: the evidence they record was tested in court; and statements of points of law are governed by doctrines of construction promulgated to guide legal interpretation.²¹ Law reporting extends the rigour of the court by carrying over the court's social and epistemological authority into the structure and style of the report on the page.²² Collectively, these features are what make a law report a report.

It sounds odd, by comparison, to ask the question 'Is this a 'report'?' of most literary works. Daniel Defoe's *Journal of the Plague Year* (1722) might be felt to be a report in a sense related to journalistic reporting, or reportage. A 'state of the nation' novel, or political satire, might be viewed as at least figuratively a 'report' on the events or social

²⁰ In 'Victorian Precedents', Ben-Yishai shows how a range of techniques were employed in law reports of the period to address the challenge of mediating between reference to a world beyond the report itself (as in historical writing, or in realist fiction) and more self-contained reference *within* the legal world of argument. Such techniques (which include widespread use of gerunds - selling, beating, attacking - to denote general classes of event and action in preference to specific actions such as 'A sold to B', 'A attacked B', etc.) are argued to have resulted in an 'anti-narrative' style in Victorian law reporting.

²¹ See Colin Manchester, David Salter, and Peter Moodie, *Exploring the Law: the Dynamics of Precedent and Statutory Interpretation*, 2nd edition. London: Sweet and Maxwell, 2000, especially chapter 2. Construction of legal terms is itself monitored and reported as a section in The Consolidated Index to Leading Law Reports (published by the Incorporated Council of Law Reporting for England and Wales), also known as the Red Book, and in supplements to it (the Pink books); these indexes cite cases during a given year that include judicial comment on the term in question.

²² In 'Anti-narrative', Ben-Yishai traces a further feature of law reports during the Victorian period: their adoption of a style with an absent narrator, in contrast with earlier 'nominate' reports of writers such as Coke and Plowden, in which the presence of a learned author was acknowledged, even accentuated.

climate of a given society. But most literary works, including those with legal themes, seem unsuited to the term. Nor is description of literary critical writing as ‘reporting’ any more intuitive. Terms with less epistemological loading seem preferable, such as review, response, appreciation, or assessment (‘analysis’ may be closest in meaning to ‘report’ in a literary context).

Law reports

How law reports written along the lines indicated above are interpreted, and how they *might be* reinterpreted in ways other than those anticipated in normal legal use, can be made clearer by a thumbnail sketch of the genre's history, structure, and functions.²³

History

In Britain, the earliest court decisions were stored in the minds of judges and court officials. But there have been what are recognisably law reports from the thirteenth century onwards, growing out of early mediaeval Plea Rolls which recorded basic details of litigation and were kept to establish the rights of the parties as well as to assist enforcement of decisions. During the period between the late thirteenth and mid-sixteenth century, reports take the form of what are now known as the *Year Books*, hand-written first in ‘law French’ and Latin, then later in English.²⁴ The *Year Books* were initially private documents, but were gradually addressed beyond the court and the parties involved to a wider public consisting largely of law students who were less interested in the details of any particular case than in understanding the reasoning applied in it, since this would offer a general picture of the system of law and might also be useful in arguing later cases. Law reports from the mid-sixteenth century are now described, especially after 1578 (the date of Edmund Plowden's *Commentaries*), as ‘nominate’ reports: commercially published, of variable accuracy, and so-called because they were known by the names of their authors (Plowden himself, Sir Edward Coke, later James Burrow, and others). The nominate reports adopted a more expansive commentary form, elaborating on and interpreting the stages of litigation and decisions handed down. Although these reports circulated widely in a rapidly expanding law profession, there was still nothing resembling a public *system* of law reporting. Over time, however, reports shifted in emphasis from simply recording judicial decisions to reporting arguments as

²³ The outline which follows is bare summary. Modern law reporting is dealt with in most guides to legal research; see for example, Peter Clinch, *Legal Research: a Practitioner's Handbook*, London: Wildy, Simmonds and Hill Publishing, 2010; or John Knowles, *Effective Legal Research*, London: Sweet and Maxwell, 2009. An accessible history of common law procedures is Alan Harding, *A Social History of English Law*, Gloucester, Mass: Peter Smith, 1973. Early cases collected as the *English Reports* (with over 100,000 cases reported between 1220 and 1873) have been reprinted by the Selden Society and in the Rolls series, and are also available online through providers such as Heinonline and Justis. Examples of contemporary reporting can be accessed by means of services including Westlaw, Lexis Library and BAILII (British and Irish Legal Information Institute), as well as, for relevant cases, on the website of The Supreme Court (from 2009) and for HL decisions pre-2009 on the House of Lords website. For context and background to law reporting, see the ICLR website.

²⁴ See Harding, *Social History of English Law*, pp.194-215.

illustration of legal reasoning, inevitably blurring the distinction between a record of particular decisions and a statement of what the law as decreed by judges was. Such reports also became more closely linked to another field of publication: that of collections of reports for several years at a time, condensed and arranged by subject-matter, and known as ‘abridgements’.²⁵ It is only later, during the second half of the eighteenth century, that more precise conventions in reporting were actively sought, for instance as regards practical arrangements for authorised reporters, agreement on which cases to report, and in order to minimise delays in publication.

From the 1860s, the *Law Reports* series conferred greater authority on published reports and incorporated counsels' arguments as well as opinions revised by judges. The second half of the nineteenth century also brought other kinds of standardisation: the *Incorporated Council of Law Reporting for England and Wales* dates from this period, followed by *Weekly Law Reports*, *Times* reports (with antecedents in the earlier *Universal Register*), then later the *All-England Reports*. While in principle any report of a judicial decision could be cited in court, law reporting gradually became a more specialised profession within the Bar; and a procedure of ‘exclusive citation’, under which preference was given to authorised reports, was adopted and periodically restated.

Following this nineteenth-century period of reforms, English law reports have largely resembled modern reports. Even now, however, in a period of online access to most decisions of courts of record (e.g. via *BAILII*), less than 5 per cent of English cases are reported in an authoritative, published form, with the selection of those cases (out of a vast number that inevitably go unreported) based on commercial as well as legal criteria. Even *Law Reports*, the most official reporting channel and so mouthpiece of legal authority, covers only about 10 per cent of that ‘less than 5 per cent’ reported overall.

Structure

One important thread in the history of law reporting has been a concern with standardising the conventions that govern the structure of reports as documents. The internal organisation of reports has been gradually adapted to the conditions in which they are used, as well as to the purposes for which they were used in successive periods. During the 20th century, reports were increasingly presented in layouts which facilitate searching, skimming and citation: clearer sign-posting of the sequence of topics; adoption of more restrictive conventions of vocabulary and sentence structure; and more explicit signalling of shifts of speech act (for example from narration of facts, through exposition of legal arguments, to the handing down of a verdict).

Allowing for some variation in different types of publication, the following list indicates how a modern law report sets out its material.

- Names of the parties, court where the case was heard, names of the judges, date
- Catchwords: compiled by the law reporter

²⁵ On abridgements, including especially the influence of Sir Anthony Fitzherbert’s *Grand Abridgement* (1516), see Harding, *Social History of English Law*, pp.198-9.

- Headnote: summary of the facts of the case, questions of law, decision (in US, known as ‘syllabus’)
- List of cases cited in judgment
- List of other cases cited in argument
- Details of the proceedings: short history of the case
- Résumé of counsels’ arguments
- Judgment: the facts, legal issues, and outcome (in the highest courts this may consist of several opinions, including dissenting opinions)
- Formal order (i.e. outcome, such as ‘appeal dismissed’)

These largely standardised stages are now effectively conventions of the law reporting genre. Each involves a formulaic mode of expression; and collectively the sections impose a distinct, overall structure.²⁶ The reader’s attention is managed both synoptically, as he or she takes an overview of the document by flicking (now scrolling) through, and also temporally, as the reader progresses from exposition to opinion to judgment and formal order. With such conventions settled, a normative instructional literature has developed *around* the genre: for law reporters, on how to compose a report; for students, on how to locate cases and efficiently skim, scan and absorb material that conforms to the standardised structure; even for judges’ clerks, on how to draft an opinion suitable for reporting.

Function / use

The structure of modern law reports emerged, then, from an iterative historical process of innovation, use and review by producers and users. Specific features evolved through ergonomic adaptation, in order to facilitate a particular approach to reading based on professional requirements.

The guidance that genre features give to reading, however, must be re-activated on each occasion of use. Some practical assistance is given with this by design features: citation conventions, to signal how to find the right report; layout, to assist with consulting an appropriate section in a report while talking at the same time. Other requirements for use are less tied to textual features than to aspects of professional behaviour. Core legal arguments are extracted from the report by means of a process of inference, for example. Two common law procedures that are closely interwoven with the law report form, but which are problematic in relation to any idea of the report genre consisting purely of textual features, stand out as in need of comment in this context: the role of the *ratio decidendi* in a legal argument; and the claim of a particular case to constitute a precedent in relation to a subsequent case.²⁷

²⁶ On what constitutes genre generally, see Douglas Biber and Susan Conrad, *Register, Genre, and Style*, Cambridge: CUP, 2009.

²⁷ More detailed discussion of the *ratio decidendi* in a case and the operation of precedent in UK law, linked to analysis of a series of illustrative cases, can be found in Manchester, Salter and Moodie, *Exploring the Law*, see esp. pp.3-58. For an introduction to the relevant history, see Harding, *Social History of English Law*. More theoretical discussion of the interaction between *ratio* and precedent can be found in legal-philosophical essays collected in Laurence Goldstein (ed.), *Precedent in Law*, Oxford: Clarendon

The *ratio* of a case is the point or rule taken to be of legal significance when abstracted from the facts of that case. It is the *ratio* which enables a case to contribute to the series of steps which carry forward legal principles from case to case on the basis of the common law principle of *stare decisis*, or ‘decision in accordance with precedent’. The *ratio* cannot, however, be itemised in a list of the sections contained in a report, because it is never directly stated: the *ratio* is not a quotable episode but an inferred construct. It is discovered -- or more accurately, worked out -- through a specialised practice of reading. Apart from having to be constructed, the *ratio* must also be distinguished from points made by a judge as *obiter dicta* (things said ‘in passing’). Such *obiter dicta* comments, which may resemble the *ratio* in making general points but differ from it in status and effect, have only ‘persuasive authority’; they do not bind later courts in the way that the *ratio* can. It is the *ratio*, once determined, that serve as the motor of common law precedent. A case submitted as a precedent may be deemed either to be ‘in point’ (and so apply), or not to apply, depending on whether the case under consideration is ‘distinguished’ from it (because what is presented as the *ratio* of the earlier case does not fit sufficiently when transposed to the facts of the case to which the precedent is claimed to apply). The inferred *ratio* and the legal purpose of observing precedent combine with the textual form of a law report to create an overall common law system of legal proceedings: a system which requires both a hierarchy of courts in which a senior court binds lower courts and, completing the reciprocal influence between textual form and professional practice, a system of accurate law reporting to ensure that citation of any claimed precedent is reliable.

Reading cases: the role of genre

The brief outline I have given of the history, structure and use of law reports will have offered nothing new to the ‘ordinary reader’ of such reports (i.e. a legal practitioner wishing to cite them in advancing a case, or a law student seeking to understand how cases function alongside statute to clarify the law, and in some circumstances extend it). In interdisciplinary work combining law with expectations of a different field, on the other hand (in this case the field of literary study), such reading conventions may appear specialised, even slightly alien. In law reporting it can be expected that genre conventions ‘beyond the page’ will be activated when a report is consulted. In a law and literature forum, on the other hand, established strategies for interpreting cases appear less certain, even up for grabs. Instead of being adhered to, ‘norm-based’ interpretive procedures associated with law reports may be open to interrogation and challenge -- or simply ignored.

How far, in such circumstances, are meaningful reading strategies limited to those which take account of procedural expectations associated with the conventions of a document

Press, 1987. The first two chapters of this volume (by Gerald Postema and by Jim Evans) provide detailed historical background, both about the origins of common law precedent and about arguments over its operation and status during the nineteenth century.

‘on the page’? Exploring this question calls for clarification of how the genre of a document serves as a guide to meaning.

Mostly, genre (of any kind, not only law reports) is described in terms of formal features, especially the conventional structures which are used to construct a complete text within the given genre. Such structures are typically manifest in one-off features that direct the text along a given path so that it achieves its intended purpose through a series of steps or moves; the headings, layout of sections, and progression through different topics culminating in a verdict or decision are genre features of a law report in this sense. Genre features of this structural kind co-occur with other markers, of linguistic register, which show continuous selection between alternative forms that have different connotations but might in other respects communicate the same meaning.²⁸ In addition, this combination of structural and register features links with genre characteristics at another level: that of audience expectations brought to bear on a text which exhibits such formal features: what the text is likely to be about, how seriously it should be taken, in many cases what kind of pleasure or insight it will offer. There appear, therefore, to be genre-defining features at two levels: a level of linguistic expression; and a level of what might be called inferential modelling, or ‘ways of reading’.

In conjunction with these two levels, however, a third, strategic level of interpretation is also important: that of the action-orientation of the interpreter, or practice in which the interpreter is engaged (arguably a different way of describing Posner’s wider concept of ‘purpose’). At this level, to extend the term ‘interpretive community’ used by Fish to indicate social groups of interpreters who follow common interpretive strategies,²⁹ readers are members of groupings or ‘communities’ not only in terms of overlapping meanings they are likely to assign but also in sharing a disposition to behave, on reading and interpreting a text, in a particular way (often by performing a text-oriented professional task or duty). Meaning for a lawyer, viewed in this way, is not only unlikely to be the same as for a literary critic; it is also likely to have a different significance in its connection with social action.

A ‘community of practice’ of this kind (e.g. a community organised around common priorities of a profession, such as lawyers or literary critics) is something more than an interpretive community in a purely ‘meaning attributing’ sense.³⁰ What makes it something more is the shift of perspective, signified by the term ‘practice’, from entertaining meanings as cognitive or affective representations to using meanings as a basis for some specialised social or professional conduct.

Interpretive practice, however, like other kinds of social practice, varies and changes. When a new or different interpretive community brings to bear interpretive strategies in

²⁸ Biber and Conrad, *Register, Genre, and Style*, see esp.pp.1-49.

²⁹ Stanley Fish, ‘What is stylistics’. See also Fish’s essays in, *There’s No Such Thing as Free Speech – And It’s a Good Thing Too*, Oxford: OUP, 1994, and *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, Durham: Duke University Press, 1990.

³⁰ The term ‘community of practice’ is used here without the emphasis on ‘group learning’ stressed by Etienne Wenger in, for example, *Communities of Practice: Learning, Meaning, and Identity*, Cambridge: CUP, 1998.

attributing meaning to a text that differ from those anticipated in the text's composition, a range of new, 'unprecedented' meanings and kinds of significance are likely to be ascribed.

The interest and value of such new meanings is properly subject to query and contestation. Posner's response to the question of how far license should extend in interpreting legal discourse in alternative ways has been that 'literary' approaches neglect crucial considerations of legal purpose. His test case for this view was that of statutes and constitutions, which, read in a different way, no longer function 'legally', as defining, normative documents. With law reports, following the same reasoning, if a report is removed from its legal moorings then a re-reading of it will similarly fail to recognise the relevant sense of legal purpose. This analogy may be imperfect, however. If a text such as a law report is reinterpreted beyond its customary discourse setting it takes on an interpretive purpose associated with its new setting as well as losing the settled meanings of the interpretive context from which it was taken. What is significant is then not so much what is lost but whether something of value is gained. In Fish's celebrated classroom anecdote of his students who thought the names of 1970s stylisticians on a blackboard were a religious poem, for example, the second class of students were not just 'not stylistics' students but something else: they were would-be interpreters learning how meanings are created from linguistic cues in religious poetry.³¹

Law reports, we have seen, follow genre conventions that are normative, embedded in the institutional functioning of law as well as in textual features. To this extent, law reports resemble Posner's statutes and constitutions. But legal cases serve purposes that directive statements do not. They narrate events in a world beyond the courts, in ways that resemble historical narrative and literary writing, especially realist fiction. There are characters, actions and motives drawn from life, overlaid with a fabric of themes, moral contrasts and kinds of significance. Composition of law reports mediates between the referential world of lived experience that can be seen from multiple points of view and a set of imposed categories of legal reasoning, in ways that differ fundamentally from the rereading of statutes or constitutions. So while it may not be easy to see the purpose of literary re-interpretation of the performative language of a statute or constitution, there may still be value in re-interpreting 'cases', whose narration creates legal and moral contrasts that lead towards judgments based on discourse in court but also have potentially life-changing implications in the extra-discursive world beyond the court.

What makes re-interpretations of cases significant is still a question of purpose, as Posner suggests. What can give value to such new readings, however, is how they revisit facts and circumstances with additional, contextual depth or insight (drawing attention to 'silent' or 'neglected' facts), or how they adopt a fresh perspective (opening up some previously unexplored line of reasoning or teasing out a subtext or hidden meaning). Apparent priorities in the original treatment of a case may be juxtaposed with competing values possibly only touched on in the margins of the proceedings themselves. Such reading is not the stuff of a traditional legal hypothetical, asking whether the case would

³¹ Stanley Fish, *Is There a Text in this Class: the Authority of Interpretive Communities*, Cambridge. Mass: Harvard University Press, 1980, pp.322-337.

have been decided differently in a different set of circumstances or at a different date. Subjected to suitable literary re-reading, legal issues may be connected to wider questions of ethics, social attitude, or change during the period in which the proceedings took place. Readings along such lines also have scope to reinstate material left out-of-frame when the complex texture of a given social experience was funnelled into a cause of legal action and the proceedings that followed.

Understanding inference and rhetoric

Many of the interpretive techniques deployed in such re-readings have affinities with, and in some cases are directly derived from, specialised kinds of interpretive work developed for reading novels, plays and films (as well as other kinds of textual analysis, including in religious scholarship). Such strategies and methods have been examined in great detail by, among others, the film scholar David Bordwell in his analysis of an ‘industry’ of interpretation in the humanities.³² Bordwell shows how interpreting involves not only problem-solving but also rhetorical expertise, features notably shared with law. At the same time interpretation is also, Bordwell shows, a conventional and to some extent formulaic social activity. To illustrate this conventional aspect, Bordwell identifies and illustrates a series of typical stages in interpreting or re-interpreting a text: explicating what is directly said; selectively assigning general semantic fields, by picking out details and elevating them into contrasts from which more general themes are derived; forming interpretive hypotheses (for instance by assuming that the text will show unity, or will leave its core message unsaid, or will be ironic or exaggerated), then mapping the chosen semantic fields onto the selected hypothesis by means of schemata (which supply evidence, possibly using metaphors and puns to strengthen relevant links); finally, presenting the interpretation in a chosen rhetorical genre, as some form of proof, exemplification of a theory, or moral parable.

The techniques of analysis and persuasion examined in Bordwell’s study are recognisable across a range of interpretive fields. What is most striking about them in this context is how they cut across the conventional division between literary criticism and the legal discourse of reported ‘cases’. There is no need to illustrate here the many kinds of insightful work that can result. Other chapters in this book amply illustrate the richness of comment and critique that can be achieved. Unfolding in the course of such readings, however, is also a further level of insight: into *how* textual interpretation is made possible by processes of attributing significance to complex kinds of narrative and expository linguistic evidence, from different points of view and for different purposes.

³² David Bordwell, *Making Meaning: Inference and Rhetoric in the Interpretation of Cinema*, Cambridge, Mass: Harvard University Press, 1989.

Conclusion

Both ‘case’ and ‘report’, I have suggested, are ordinary words whose polysemy complicates interdisciplinary study, while passing largely unnoticed. Exploiting such polysemy, in order to produce insightful, interdisciplinary readings of legal cases, opens up new and potentially important responses to legal topics and themes. But what quickly becomes evident in such work is that ‘reading’ and ‘interpretation’ are similarly complex words and concepts.³³ Whereas ‘case’ and ‘report’ are words whose polysemy might be viewed as somehow incidental, however, ‘reading’ and ‘interpretation’ are foundational terms of art in both literature and law. As with other terms of art, these words call for analysis of the different meanings they can reasonably bear in different contexts, as well as analysis of why other meanings for them appear strained or extraneous. To strengthen understanding of how such terms function in law and literature, and to what effect, reflexiveness and critical interrogation is required of a kind that Posner considered -- perhaps oddly, given the centrality of skills of construction in law -- merely unlikely to contribute to legal understanding.

³³ A recent analysis of meaning and interpretation in relation to legal language is Chris Hutton, *Language, Meaning and the Law*, Edinburgh: Edinburgh University Press, 2009. My own investigation of issues raised by ‘interpretation’, with particular reference to media law and regulation, is Alan Durant, *Meaning in the Media: Discourse, Controversy and Debate*, Cambridge: CUP, 2010.